IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-6386

WILLIAM JAMES RUMMEL, Petitioner,

v.

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF
CORRECTIONS, Respondent.

A P P E N D I X

SCOTT J. ATLAS
Vinson & Elkins
2100 First City National
Bank Building
Houston, Texas 77002

Counsel for Petitioner

Of Counsel

CHARLES ALAN WRIGHT
2500 Red River
Austin, Texas 78705

March 10, 1979

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Appendix A: Courts Below

Appendix B: Constitution and Statutes

Appendix C: Other Cases

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

U. S. COURT OF APPEALS
FILED

NO. 76-2946

MAR 9 1979

EDWARD W. WADSWORTH
CLERK

WILLIAM JAMES RUMMEL,

Petitioner-Appellant,

versus

W. J. ESTELLE, JR., Director,
Texas Department of Corrections,

Respondent-Appellee.

- - - - - -

Appeal from the United States District Court for the
Western District of Texas

- - - - - -

ON PETITION FOR REHEARING

(March 9, 1979)

Before BROWN, Chief Judge, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN and VANCE, Circuit Judges*.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby Denied.

ENTERED FOR THE COURT:

CHIEF JUDGE

*Judge Thornberry was a judge in regular active service on the en banc court when the decision in this cause was rendered. Subsequently Judge Thornberry took Senior Status. On October 20, 1978 the Omnibus Judgeship Bill, Public Law 95-486 (95th Congress) was approved. Judge Thornberry did not participate in this decision.

United States Court of Appeals

FIFTH CIRCUIT

EDWARD W. WADSWORTH
CLERK

OFFICE OF THE CLERK

TEL. 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA. 70130

December 20, 1978

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 76-2946 - WILLIAM JAMES RUMMEL vs. W.J. ESTELLE, JR., Director, Texas Dept. of Corrections

Dear Counsel:

Enclosed is a copy of the Court's opinion this day rendered in the above case. A judgment has this day been entered in accordance therewith pursuant to Rule 36 of the Federal Rules of Appellate Procedure.

Rules 39, 40 and 41, F.R.A.P., govern costs, petitions for rehearing and mandates, respectively. A petition for rehearing must be filed in the Clerk's Office within 14 days from this date. Placing the petition in the mail on the 14th day will not suffice.

Local Rule 17 provides that "A motion for a stay of the issuance of a mandate in a direct criminal appeal filed under F.R.A.P. Rule 41 shall not be granted simply upon request. Unless the petition sets forth good cause for stay or clearly demonstrates that a substantial question is to be presented to the Supreme Court, the motion shall be denied and the mandate thereafter issued forthwith."

If you are court-appointed counsel, your attention is called to Local Rule 7 which provides: "Appointed counsel shall, in the event of affirmance or other decision adverse to the party represented, promptly advise him in writing of his right to seek further review by the filing of a petition for writ of certiorari with the Supreme Court, and shall file such petition, if requested by such party in writing to do so."

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By Clara F. Sachs
Deputy Clerk

enc.
cc: Mr. Scott J. Atlas ✓
Mr. Dunklin Sullivan
Mr. Gilbert J. Pena
Mr. Keith W. Burris
Messrs. Harry J. Schulz, Jr.
Henry Wade

RECEIVED
DEC 22 1978
S.J.A.

William James RUMMEL,
Petitioner-Appellant,

v.

W. J. ESTELLE, Jr., Director, Texas Department of Corrections,
Respondent-Appellee.

No. 76-2946.

United States Court of Appeals,
Fifth Circuit.

Feb. 21, 1979.

State prisoner sought writ of habeas corpus. The United States District Court for the Western District of Texas, Dorwin W. Suttle, J., denied relief, and petitioner appealed. A panel of the Court of Appeals, 568 F.2d 1193, held that a life sentence that had been imposed under the Texas habitual criminal statute violated the Eighth Amendment. On rehearing en banc, the Court of Appeals, 587 F.2d 651, held that even as applied to petitioner, the Texas habitual criminal statute did not amount to cruel and unusual punishment, and remanded to the panel for a determination of petitioner's contention that he was denied effective assistance of counsel. On remand, a panel of the Court of Appeals held that petitioner's allegations were sufficient to raise a question as to whether an appointed attorney discharged his duty to interview potential witnesses and make an independent examination of the facts and where the issue had not been resolved after a full hearing by the Texas court, a federal evidentiary hearing was required.

Vacated in part and remanded with directions.

1. Criminal Law ⇐641.13(4)

A criminal defendant has the right to be represented by counsel reasonably likely to render and rendering reasonably effective assistance.

2. Criminal Law ⇐641.13(6)

Investigation and preparation are the keys to effective representation and, therefore, court-appointed counsel has a duty to interview potential witnesses and make an independent examination of the facts, circumstances, pleadings and laws involved in a criminal prosecution.

3. Habeas Corpus ⇐59

Allegation, raised by state prisoner in support of petition for habeas corpus, that attorney who was appointed approximately one month prior to trial did not conduct an independent pretrial investigation into the factual basis of the state's charges and neglected to seek out and interview witnesses whose testimony petitioner had told the attorney would buttress petitioner's defense was sufficient to raise issue whether the attorney discharged his responsibility to interview potential witnesses and make an independent examination of the facts and where the issue had not been resolved after a full hearing by Texas court, a federal evidentiary hearing was required.

4. Habeas Corpus ⇐59(9)

Fact that habeas corpus petitioner's attorneys performed other tasks required of them, such as interviewing their client and cross-examining prosecution witnesses, was not dispositive of petitioner's claim that his appointed attorney failed to conduct an independent pretrial investigation into the factual basis of the state's charges and neglected to seek out and interview witnesses about whom the attorney had been informed by petitioner.

5. Habeas Corpus ⇐25.1(6)

Fact that petitioner knew only where alleged potential witnesses worked, rather than their names, and did not conduct his own investigation while free on bail before his attorneys were appointed was not necessarily fatal to plea for habeas corpus relief based on allegation that attorney who was appointed approximately one month before trial did not conduct an independent pretrial investigation into the factual basis for the state's charges and neglected to seek out and interview witnesses about whom the attorney had been informed by petitioner.

6. Criminal Law ⇐641.13(1)

Each case involving the constitutional issue of effectiveness of counsel depends on the specific conduct of the parties involved.

Appeal from the United States District Court for the Western District of Texas.

Before THORNBERRY, GOLDBERG and CLARK, Circuit Judges.

PER CURIAM:

This court en banc has disposed of petitioner's assertion that his sentence violated the eighth amendment. The responsibility for determining Rummel's second contention that he was denied effective assistance of counsel for his defense has been remanded to the panel. 587 F.2d 651 at 662.

Two attorneys represented Rummel in connection with the state charges. The first was appointed approximately one month prior to the trial, and the second, whose effectiveness is not challenged, was appointed on the date of the trial to assist the first. Rummel asserts that his first appointed attorney failed to conduct an independent pre-trial investigation into the factual basis of the state's charges and neglected to seek out and interview witnesses whose testimony the petitioner had informed him would buttress his defense. These allegations are not contradicted in the record, and it cannot be said that, assuming they are true, the petitioner is entitled to no relief as a matter of law.

[1-5] A criminal defendant has the right to be represented by counsel "reasonably likely to render and rendering reasonably effective assistance." *Herring v. Estelle*, 491 F.2d 125, 127 (5th Cir. 1974), *quoting Mackenna v. Ellis*, 280 F.2d 592, 599 (5th Cir.), *cert. denied*, 368 U.S. 877, 82 S.Ct. 121, 7 L.Ed.2d 78 (1960). Since "investigation and preparation are the keys to effective representation," ABA Projects on Standards for Criminal Justice, Standards Relating to the Prosecution Function and the Defense Function 224 (App. Draft 1971), court-appointed counsel have a duty to interview potential witnesses and "make an independent examination of the facts, circumstances, pleadings and laws involved." *Von Moltke v. Gillies*, 332 U.S. 708, 721, 68 S.Ct. 316, 322, 92 L.Ed. 309, 319 (1948). *See Pennington v. Beto*, 437 F.2d 1281 (5th Cir. 1971); *United States v. Decoster*, 159 U.S.App.D.C. 326, 333, 487 F.2d 1197, 1204 (1973), *appeal after remand* —— U.S.App.D.C. ——, —— F.2d —— (1976), *opinion vacated and rehearing en banc granted*, —— F.2d —— (1977); *McQueen v. Swenson*, 498 F.2d 207, 217 (8th Cir. 1974). Rummel's allegations are sufficient to raise the issue whether his attorneys discharged this responsibility. The fact that they performed other tasks required of them—

such as interviewing their client and cross-examining witnesses for the prosecution—obviously is not dispositive. Nor is the fact that Rummel knew only where the potential witnesses worked, rather than their names, and failed to conduct his own investigation while free on bail before his attorneys were appointed, necessarily fatal to his plea for habeas corpus relief.

[6] As we noted in *King v. Beto*, 429 F.2d 221, 222, n. 1 (5th Cir. 1965), *cert. denied*, 401 U.S. 936, 91 S.Ct. 921, 28 L.Ed.2d 216 (1971), "each case involving the constitutional issue of effectiveness of counsel depends on the facts—the specific conduct of the parties involved." Here the factual development necessary for a just determination of the merits of Rummel's petition is lacking. An examination of the record indicates that, among others, the question whether Rummel's counsel conducted a pre-trial investigation has never been answered. Under these circumstances, the denial of his request for a hearing was erroneous. Since Rummel's petition is legally sufficient and raises issues of material fact that have not been resolved after a full hearing by the Texas court trier of fact, a federal evidentiary hearing is required. *Townsend v. Sain*, 372 U.S. 293, 312–313, 83 S.Ct. 745, 757, 9 L.Ed.2d 770 (1963). We expressly note that this opinion is not intended to predict the outcome of such a hearing. The portion of the district court's opinion denying relief on the claim of ineffective assistance of counsel is vacated and the cause is remanded with directions to accord petitioner a hearing on this issue.

VACATED IN PART AND REMANDED.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

FILED
JUL 14 1976
DAN W. BENEDICT, CLERK
BY Deputy

WILLIAM JAMES RUMMEL	)	
	)	
VS.	)	SA-76-CA-20
	)	
W. J. ESTELLE, JR., DIRECTOR TEXAS DEPARTMENT OF CORRECTIONS	)	

ORDER DENYING PETITIONER'S MOTION FOR RECONSIDERATION

After reviewing the file in the present case, together with the Petitioner's Motion for Reconsideration filed June 2, 1976, the Court finds no new arguments or authorities not previously raised by the Petitioner and considered by the Court that would warrant the reconsideration and reversal of the Court's decision rendered May 14, 1976, denying the Petitioner's application for habeas corpus relief. The Petitioner's Motion for Reconsideration is, according, DENIED.

SO ORDERED this the 14th day of July, 1976.

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

SAN ANTONIO DIVISION

FILED
MAY 17 1976
DAN W. BENEDICT, Clerk
By Deputy

WILLIAM JAMES RUMMEL

VS. SA 76 CA 20

W. J. ESTELLE, JR., Director,
Texas Department of Corrections

JUDGMENT

This action came on for consideration before the Court, Honorable D. W. Suttle, United States District Judge, and the issues having been duly considered and the Court having rendered a decision on May 14, 1976, denying Petitioner's application for habeas corpus relief,

It is, therefore, ORDERED AND ADJUDGED that the petition for writ of habeas corpus is denied and this cause is terminated.

DATED at San Antonio, Texas, this 17th day of May, 1976.

DAN W. BENEDICT, CLERK
UNITED STATES DISTRICT COURT

By: Carolyn L. Wright
Deputy U. S. District Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

FILED
MAY 14 1976
DAN W. BENEDICT, Clerk
By Deputy

WILLIAM JAMES RUMMEL)
)
VS.) SA-76-CA-20
)
W. J. ESTELLE, JR., Director)
Texas Department of Corrections)

ORDER DENYING PETITION FOR HABEAS CORPUS RELIEF

Petitioner, William James Rummel, was convicted in the 187th District Court of Bexar County, Texas, after his plea of not guilty upon the charges of theft of property over the value of $50.00 by false pretext. Two prior convictions were proven in his record, and he was sentenced to life imprisonment. Upon appeal, Petitioner's conviction was affirmed by the Texas Court of Criminal Appeals. See Rummel v. State, 509 S.W.2d 630.

In the present Petition the Petitioner raises the following points of alleged error by the trial court:

(1) Ineffective counsel, and

(2) Harsh, cruel, and unusual punishment.

Neither of these points were raised upon appeal, but each was raised in a petitions for habeas corpus in the trial court. In this connection, the trial judge filed findings of fact and conclusions of law, and found that the application was without merit and should be denied. Texas Court of Criminal Appeals followed this recommendation and denied the Petitioner's application without written order. Therefore, the Court finds that the Petitioner has exhausted his State court remedies pursuant to provisions of 28 U.S.C. §2254(b).

After reviewing the record in the present case together with the transcript of State court proceedings, the Court finds that upon a showing of indigency the Petitioner was first appointed Mr. William B. Chenault, III, as counsel one month before his trial. Thereafter, on the day of trial, the Petitioner was appointed a second attorney at his own request,

who was directed to assist his first appointed counsel. The Petitioner complains that Mr. Chenault made no pretrial motions, no independent investigation of his case, did not know the names of the State's witnesses, and failed to call any witnesses on the Petitioner's behalf. Petitioner was released on bail some two weeks after his arrest and at least four months before Chenault was appointed to represent him. The Petitioner admitted knowing none of the names of the witnesses whom he contends that his attorney, Mr. Chenault, should have called to testify on his behalf, except for the complaining witness, Shaw. Chenault's co-counsel obtained an instrument from Mr. Shaw entitled "Release and Non-prosecution Statement." The instrument had first been the subject of a Motion in Limine by the State at the commencement of the trial, which Motion was granted and Chenault was instructed not to attempt to introduce it. Nevertheless, prior to the hearing on punishment at the conclusion of the trial, Chenault sought permission to offer it in evidence, but such permission was denied. As observed by the Appellate Court, Shaw's testimony was factual and expressed no opinion concerning the appellant's guilt, and the instrument was not admissible for impeachment purposes. Shaw's prior testimony given to the attorneys was not inconsistent with any material testimony he gave at the trial. As to the Petitioner's complaint that other "witnesses" were not called and that Mr. Chenault did not know their names, but knew where they worked, the Court finds that the Petitioner was at liberty on bail for many months before his attorneys ever had the opportunity to look into the matter of possible helpful evidence, and evidently made no effort to do so.

Although the trial judge held no evidentiary hearing, he prepared a remarkably detailed set of findings and conclusions which appear in the transcript. It shows that among

other things, Mr. Chenault obtained a continuance on the Petitioner's behalf, discussed the case with Petitioner at the jail on at least three occasions, examined the State's file, communicated with the Petitioner's parents by telephone and letter, intensively cross-examined witnesses of the State, moved for an instructed verdict, objected to the Court's charge and submitted requested instructions, one of which was granted by the Court, and attempted to impeach the complaining witness by introduction of the above mentioned instrument.

In the Petitioner's traverse, he cites the Fifth Circuit case of MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960), which is the landmark case within the Fifth Circuit on the standard for effective counsel. In MacKenna, the Fifth Circuit stated that the right to effective counsel means not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance. Id. at 599. Reviewing the transcript of State court proceedings in this case in light of the Fifth Circuit's standard in MacKenna, the Court finds that Petitioner's first contention is without merit.

The second and final point raised by the Petitioner, namely, that he was subjected to cruel and unusual punishment in violation of the Constitution, by reason of the jury's verdict of life imprisonment based upon the enhancement statute, is also without merit. It has been held that the Texas enhancement statute is Constitutional. See Spencer v. Texas, 385 U.S. 554 (1967). The Fifth Circuit has also followed the Spencer decision. Further, the argument advanced by the Respondent to the effect that a "life sentence" is nothing of the sort because State Parole law in regulation entitle a convict to release on

parole after he has served approximately twelve years, and even less if such prisoner is made a trusty, effectively answers any attack on this sentence as being cruel and unusual punishment forbidden by the Constitution. The Court finds Petitioner's second contention to also be without merit.

Therefore, for the reasons and authorities cited above, the Court finds that an evidentiary hearing is not warranted in this case, and that the Petitioner's application for habeas corpus relief should be and the same is hereby DENIED.

SO ORDERED this the 13th day of May, 1976.

UNITED STATES DISTRICT JUDGE

PETITIONER [illegible] APPLICATION NO. [illegible]

APPLICATION FOR WRIT OF [illegible]

ACTION TAKEN:

Application Denied Without Written Order on Findings of the Trial Court After Hearing.

Judge Date

Application Denied Without Written Order on Findings of the Trial Court Without Hearing.

[illegible] 9/23/75

Judge Date

Application Denied Without Written Order and Without Prejudice as to Petitioner's Right to Apply to the Trial Court.

Judge Date

Application Denied Without Written Order.

Judge Date

Direct Appeal Pending - No Action Necessary.

Judge Date

Application Denied With Written Order.

Judge Date

File and Set for Submission.

Judge Date

JUDGE _____ DATE SUBMITTED _____ ADM.ASST. _____

FINDINGS OF FACTS, CONCLUSIONS OF LAW AND ORDER THEREON

EX PARTE	WRIT NOS. 298 & 304	IN THE DISTRICT COURT
	§	187TH JUDICIAL DISTRICT
WILLIAM JAMES RUMMEL	§	BEXAR COUNTY, TEXAS

O R D E R

Petitioner William James Rummel has filed in this Court two applications for post-conviction writ of habeas corpus. He alleges that he is illegally restrained for the following reasons: (1) He received ineffective assistance of counsel. (2) His life sentence imposed pursuant to Article 63, Vernon's Tex. P.C. (1925), is invalid because it violates the Eighth Amendment proscription against cruel and unusual punishment.

HISTORY OF THE CASE

On January 31, 1973, petitioner was indicted by the Bexar County Grand Jury for the offense of theft over the value of $50 by false pretext in cause number 73-CR-214. Two prior convictions were alleged for enhancement purposes. On April 9, 1973, trial was held before a jury in the 187th District Court of Bexar County, the undersigned judge presiding. The jury found petitioner guilty as charged. At the punishment phase, the jury found that petitioner had been previously convicted as alleged in the indictment, and the Court, in accordance with Article 63, assessed punishment against petitioner at imprisonment for life in the Texas Department of Corrections. Not having filed a motion for new trial, petitioner was duly sentenced by the Court on April 26, 1973. Petitioner appealed his conviction to the Court of Criminal Appeals. On May 22, 1974, that Court affirmed the conviction and delivered its opinion signed by Commission Reynolds. Rummel v. State, 509 S.W.2d 630 (Tex. Cr. App. 1974).

FINDINGS OF FACT

The court has reviewed the records in petitioner's case and in connection with his application for writ of habeas corpus enters

the following findings of fact:

1. Petitioner was represented by attorney William B. Chennault, III, who was appointed by the Court on February 20, 1973.

2. Mr. Chennault was assisted in representing petitioner by another attorney, Harold Warford.

3. On March 5, 1973, the date originally set for trial, attorney Chennault moved for a continuance, which was granted by the Court. Trial was then set for April 9, 1973.

4. Prior to trial, attorney Chennault discussed the case with petitioner at the Bexar County Jail on February 22, March 6, and March 28, 1973. He also secured examination of the State's file and communicated with petitioner's parents by telephone and letter.

5. On the day of trial the Court denied attorney Chennault's request to withdraw as counsel for petitioner. Mr. Warford was permitted to act as co-counsel for petitioner.

6. At trial the testimony of the State's principal witnesses suggested that petitioner had attempted to perform his agreement with the complainant. Mr. Chennault proceeded to develop before the jury by extensive cross-examination the theory that the dispute between petitioner and the complainant was simply a contractual matter involving petitioner's failure to perform his part of the bargain. On this theory of the case, Mr. Chennault moved for an instructed verdict of acquittal when the State rested its case. The motion was overruled and denied by the Court. After both sides had closed, Mr. Chennault objected in writing to the Court's charge and submitted two written requested instructions, one of which was granted by the Court.

7. Petitioner's attorney also attempted to impeach the complainant during trial with a written release and non-prosecution agreement signed by the complainant a few days before trial. It appears that this instrument was obtained from the complainant by petitioner's parents with Mr. Warford's assistance.

8. At the punishment phase of the trial, petitioner pled "true" to both paragraphs of the indictment alleging prior convictions. The State introduced duly authenticated documentary

evidence which supported the jury's verdict that petitioner had been previously convicted as alleged in the indictment.

9. Petitioner by letter to this Court requested that Mr. Warford be appointed to represent petitioner on appeal. Mr. Warford was so appointed by this Court at the sentence hearing on April 26, 1973.

10. This Court finds that petitioner's appointed counsel, both at trial and on appeal acted effectively in his behalf.

11. No evidentiary hearing is deemed necessary.

CONCLUSIONS OF LAW

As matters of law, this Court concludes that:

1. Petitioner in his application has sworn to no fact which, if true, would render his judgment of conviction void and his confinement illegal.

2. Petitioner received effective assistance of court-appointed counsel. Petitioner was not entitled to errorless counsel or counsel judged ineffective by hindsight, but counsel who is reasonably likely to and who does render reasonably effective assistance.

3. This Court was under no duty or obligation to search for counsel until an attorney was found who was agreeable to petitioner.

4. Under the circumstances of this case, petitioner's life sentence is not so excessive or disproportionate as to constitute cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution.

5. Petitioner is legally confined by virtue of a valid judgment and sentence in cause number 73-CR-214.

6. No evidentiary hearing is necessary.

7. Petitioner's application for writ of habeas corpus is without merit and should be denied.

ORDERS OF THIS COURT

1. Petitioner's application for writ of habeas corpus is hereby denied.

2. The clerk of this Court shall:

(a) Transmit this ORDER with attachments to the Court of Criminal Appeals, sitting in Austin, Texas, in accordance with Article 11.07, Vernon's Ann. C.C.P.

(b) Send a copy of this ORDER with attachments to petitioner by depositing same in the U. S. Mail, postage prepaid, addressed to William James Rummel, TDC Inmate 238534, P. O. Box 1500, Retrieve Unit, Angleton, Texas 77515.

Entered this 25 day of July, A. D., 1975.

JUDGE
187TH DISTRICT COURT
BEXAR COUNTY, TEXAS

mitted for its determination. We cannot conclude that the error was harmless.

The judgment is reversed and the cause remanded.

William J. RUMMEL, Appellant,

v.

The STATE of Texas, Appellee.

No. 48046.

Court of Criminal Appeals of Texas.

May 22, 1974.

Defendant was convicted in the 187th Judicial District Court, Bexar County, John G. Benavides, J., of theft by false pretext, and he appealed. The Court of Criminal Appeals, Charles L. Reynolds, C., held that evidence sustained conviction; and that prior verified statement of prosecution witness reciting that "I have knowledge of no facts upon which any criminal prosecution could be based" constituted mere expression of opinion that defendant was not guilty of theft by false pretext and was not admissible to impeach witness who did not express opinion at trial concerning guilt.

Affirmed.

1. False Pretenses ⇐49(6)

Evidence, including evidence that defendant obtained check payable to third person to purchase compressor for air conditioner and that defendant within 30 minutes of receipt converted check into cash which he appropriated to his own use and benefit, sustained conviction for theft by false pretext.

2. Criminal Law ⇐549

Hearsay testimony has no probative value.

3. Criminal Law ⇐371(3)

In prosecution for theft by false pretext, evidence of defendant's subsequent misrepresentations to third parties was material to establishment of defendant's initial intent to appropriate funds belonging to maker of check by false pretext.

4. Witnesses ⇐379(3)

Prior verified statement of prosecution witness reciting that "I have knowledge of no facts upon which any criminal prosecution could be based" constituted mere expression of opinion that defendant was not guilty of theft by false pretext and was not admissible to impeach witness who did not express opinion at trial concerning guilt.

5. Witnesses ⇐379(3), 383

Prior statement is not admissible for impeachment if it is confined to opinion that accused is not guilty or to other irrelevant matters.

6. Criminal Law ⇐847, 1038.1(3)

Acquiescence in and absence of an objection to form of charge with respect to punishment not only failed to preserve but waived any error.

7. Criminal Law ⇐884

Where defendant's two prior noncapital felony convictions were properly alleged and proved, punishment of life imprisonment was automatically fixed by law and there was no necessity for jury to assess punishment. Vernon's Ann.P.C. art. 63.

Harold L. Warford, San Antonio, for appellant.

Ted Butler, Dist. Atty. and Antonio Cantu, Fred Rodriquez and Douglas C. Young, Asst. Dist. Attys., San Antonio, Jim D. Vollers, State's Atty., Austin, for the State.

OPINION

CHARLES L. REYNOLDS, Commissioner.

The conviction is for the offense of theft by false pretext. The punishment, enhanced by the jury's finding that appellant had two prior non-capital felony convictions, was assessed by the court at life imprisonment.

When the State closed its evidence on the issue of guilt, appellant moved for, and was denied, an instructed verdict, and this denial is the subject of the second ground of error. Since appellant primarily is complaining of the sufficiency of the evidence, it is appropriate to review the facts for that resolution.

Appellant did not testify and he presented no witness in his behalf. Except as otherwise indicated, the recitation of facts is from the testimony of two of the State's witnesses, David Lee Shaw, Sr., and Paul Ellis.

Shaw had leased Captain Hook's Lounge in San Antonio from Ellis. About noon on August 15, 1972, Shaw and Ellis were discussing extra air conditioning for the lounge. During the course of the conversation, appellant entered the lounge.

Ellis had a used air conditioning unit, with a bad compressor, which he offered to Shaw if Shaw wanted to buy a compressor for it. Appellant interrupted the conversation to state that he was an air conditioning repairman, and that he could get another compressor and install it.

When Shaw asked the cost, appellant replied that he would call Service Supply. Returning from the telephone, appellant said the compressor would cost $120.75, and he would get it from Service Supply. An agreement was reached on the amount of appellant's installation fee. It was further agreed that appellant would buy the compressor, get the air conditioning unit from another bar owned by Ellis, and meet Ellis the next morning at Captain Hook's Lounge where appellant was to put the compressor in the unit and install the complete unit.

Appellant asked for the money to buy the compressor. Shaw wrote his personal check made payable, at the suggestion of Ellis, to Service Supply in the sum of $120.75, designating thereon that it was for "Air Conditioner Comp." Shaw delivered the check to appellant at approximately 2 p. m.

In delivering the check to appellant, Shaw believed that appellant wanted to fix the air conditioner. Shaw intended and believed that the proceeds were for the purchase of a compressor and he intended that Service Supply cash the check. He did not give appellant permission to cash the check and obtain the proceeds.

A short time after appellant left the lounge, he telephoned Shaw. He reported that Service Supply did not have the compressor, but that he could get one at Montgomery Ward Company through, as Shaw understood, Service Supply. Approximately one hour later, appellant called again. He told Shaw not to worry and that everything was all set, which Shaw took to mean that appellant had obtained the compressor.

On the same day, appellant appeared before Ada Wesch, collection teller at the bank on which Shaw's check was drawn. According to Mrs. Wesch, appellant said he was, or that he represented, Service Supply and wanted to cash Shaw's check. Mrs. Wesch refused to cash the check since appellant did not have an account with the bank. She advised that he go to his own bank. Appellant was insistent that she cash the check and she, having verified that Shaw had sufficient funds on deposit and that there was no stop payment order on the check, suggested that she could

guarantee the money by issuing a cashier's check in exchange for Shaw's check. Appellant accepted the suggestion. He endorsed Shaw's check with the names Service Supply and William Rummel. He received the bank's cashier's check made payable to Service Supply in the same sum as, and in exchange for, Shaw's check.

It was the testimony of Mary Beth O'Brien, drive-in teller at the same bank, that at approximately 2:30 p. m. on the same day, a man, who stated he was, or that he represented, Service Supply, presented the cashier's check to her for cash. After viewing the man's picture on, and entering on the cashier's check the number of, the Texas driver's license presented to show that he was Mr. Rummel, and comparing the signatures on the license and the cashier's check endorsement, Miss O'Brien cashed the cashier's check. Mrs. Wesch testified that the endorsement on Shaw's check and the endorsement on the cashier's check were the same.

It was shown by Glen Richardson, one of the owners of Service Supply, that no one by the name of William Rummel ever worked for the company and that William Rummel was never authorized to cash checks for Service Supply.

Late the next day when Shaw had heard nothing further from appellant, he called Service Supply. He was informed that appellant had been there, but that the company could not sell to him since he was not an authorized dealer. Attempts by Shaw and Ellis to locate appellant proved fruitless. Ellis was told that appellant had gone by the bar where the air conditioning unit was located to look at it, but that it would not fit in the trunk of appellant's car.

Ellis thought that Shaw should stop payment on his check. On August 17, 1972, Shaw went to his bank to stop payment on his check, and he was told that his check had been cashed.

For three weeks, Ellis tried unsuccessfully to locate appellant, who did not return to the lounge nor contact either Shaw or Ellis. Approximately a month after the occurrence, Shaw lodged a complaint against appellant and, about a month later, Shaw sold his interest in the lounge. The record reasonably supports the inference that neither Shaw nor Ellis saw appellant again until the day of the trial.

[1] The force of appellant's insufficient evidence argument is that, since Shaw believed appellant wanted to perform his undertaking and the evidence shows that appellant attempted to perform the agreement, the evidence illustrates, not a theft by false pretext, but only a subsequent failure by appellant to fulfill a contractual obligation. The fact that appellant subsequently failed to perform under his representation as to future events does not render the evidence insufficient, because a statement as to future happenings, if it is a false representation by which one is induced to part with his property, may form the basis of the offense of theft by false pretext. Hilliard v. State, 401 S.W. 2d 814 (Tex.Cr.App.1966), cert. denied 385 U.S. 941, 87 S.Ct. 310, 17 L.Ed.2d 220 (1966), rehearing denied, 385 U.S. 1021, 87 S.Ct. 726, 17 L.Ed.2d 561 (1967).

The issue, then, is whether the evidence is sufficient to support the jury's verdict that appellant obtained Shaw's $120.75 by a false pretext which induced Shaw to surrender his money. In considering its sufficiency, the evidence must be viewed in the light most favorable to the jury's verdict. White v. State, 478 S.W.2d 506 (Tex.Cr.App.1972); Jones v. State, 442 S.W.2d 698 (Tex.Cr.App.1969, cert. denied 397 U.S. 958, 90 S.Ct. 967, 25 L.Ed.2d 143 (1970)).

In presenting the ground of error, appellant concedes that Shaw surrendered his money on the belief that appellant wanted to perform as he represented he would. Thus, if the evidence sufficiently shows

that appellant's ostensible reason—i. e., to buy the compressor preparatory to repairing the air conditioning unit—concealed his then true intent—i. e., to wrongfully take Shaw's money—the offense of theft by false pretext was complete.

[2] Notwithstanding the hearsay testimony that appellant had been to Service Supply and had gone to look at Ellis' air conditioner,[1] the jury was entitled to credit with probative weight the evidence that appellant neither negotiated the check to the named payee nor returned it if he was not allowed to buy at Service Supply, but instead, by asserting that he was authorized to cash the check, converted it into cash within thirty minutes of its receipt and, never again contacting Shaw, without consent appropriated the cash to his own use and benefit. These actions by appellant, considered with the surrounding circumstances, were justification for the jury's conclusion that appellant's representations that he would buy the compressor with the check and thereupon repair and install the air conditioning unit were false, and that appellant had the intent to wrongfully take Shaw's money and appropriate it to his own use and benefit at the very time he made the false representation. Being properly charged in the matter, the jury's conclusion on the facts is final. Johnson v. State, 144 Tex.Cr.R. 392, 162 S.W.2d 980 (1942). The second ground is overruled.

[3] Interrelated is the complaint expressed in the third ground that the jury should have been charged that any subsequent misrepresentations to third parties would be immaterial. To the contrary, the subsequent misrepresentations were material to the establishment of appellant's initial intent to appropriate Shaw's money by false pretext. See, e. g., Hoovel v. State, 125 Tex.Cr.R. 545, 69 S.W.2d 104 (1934), for the principle that in determining intent at the time of the representation, the circumstances prior to, at the time of, and subsequent to the transaction must be considered. But in any event, the court's charge properly limited the jury's consideration of false pretext to appellant's representations to Shaw. The third ground is overruled.

[4] The ground first presented is that the court erred in excluding from evidence a verified statement previously executed by, and claimed by appellant to be contradictory of the trial testimony adduced from, the witness Shaw. The events leading to this contention are briefly recited.

Two days before the trial commenced on April 9, 1973, Shaw received a call from appellant's parents. They wanted to make restitution if Shaw would agree to "drop the charges." Shaw received fifty dollars. He executed a verified instrument entitled "Release and Statement of Refusal to Prosecute." The instrument recites that Shaw released appellant, subject to any claims his insurance company may have against appellant, from all claims arising from the occurrence, that Shaw had "knowledge of no facts upon which any criminal prosecution could be based," and that Shaw would appear as a witness only under compulsion.[2]

Prior to the introduction of evidence, the State presented its motion in limine seeking to exclude from the jury any affidavit or statement of non-prosecution executed by Shaw. After hearing argument of counsel, the court granted the motion.

At the close of the guilt-innocence phase of the trial, appellant tendered Shaw's statement for admission into evidence. Following argument of counsel, the court again refused to admit the statement.

The thrust of appellant's presentation is that the portion of Shaw's verified statement reading, "I have knowledge of no

1. Hearsay testimony has no probative value. Salas v. State, 403 S.W.2d 440 (Tex.Cr.App. 1966).

2. No challenge was made to the prosecutor's in-court statement that Shaw was voluntarily appearing as a witness.

facts upon which any criminal prosecution could be based" was admissible for impeachment purposes. We do not agree.

This is not the situation where, as in Hutson v. State, 164 Tex.Cr.R. 24, 296 S.W.2d 245 (1956), relied upon by appellant, the witness denied expressing a prior opinion opposed to that he testified to at the trial, in which event, *Hutson* holds, evidence of the prior statement may be received as proof that he did make such statement. At the trial in the instant case, Shaw expressed no opinion concerning appellant's guilt.

Neither is it the situation where, as shown in appellant's cited cases announcing the proposition that, an adverse witness may be impeached by his prior statement contradictory to his trial statement on a material issue. Here, Shaw's prior statement was not inconsistent with any material testimony he gave at the trial.

[5] Rather, here, Shaw's statement that he had no knowledge of appellant's guilt of a criminal offense presents the situation of a mere expression of opinion that appellant was not guilty. It long has been the rule in this State that a prior statement is not admissible if it is confined to an opinion that the accused is not guilty or to other irrelevant matters. Taylor v. State, 38 Tex.Cr.R. 552, 43 S.W. 1019 (1898). Falling into that category, the statement was not admissible. The first ground is overruled.

[6] Finally, appellant contends the court erred in withdrawing the question of punishment from, and submitting only a charge as to the special pleas to the allegations of prior felony convictions to, the jury. The ground is without merit.

Upon tender of the charge on punishment to counsel, the court inquired if there were any objections. One of defense counsel answered, "So far, Your Honor, I have no objection" and, after a discussion of the forms of verdict, the same counsel stated, "I have no objection."

[7] The acquiescence in, and the absence of an objection to, the form of the charge not only failed to preserve but waived any error, Jaffrion v. State, 501 S.W.2d 322 (Tex.Cr.App.1973), and, therefore, nothing pertaining to the charge is presented for review. Dominguez v. State, 459 S.W.2d 623 (Tex.Cr.App.1970). The fourth and last ground is overruled.[3]

The judgment is affirmed.

Opinion approved by the Court.

3. It is noted in passing that appellant, to support the contention that the jury should have fixed the punishment, quotes subsection 2(b) of Article 37.07, Vernon's Ann.C.C.P., which was repealed in 1967. Subsection 1(b) of the statute now provides that, except in a situation not material here, the jury "shall assess the punishment in all cases where the same is not absolutely fixed by law to some particular penalty."

Pursuant to appellants plea of "True" before the jury to each of the two allegations of a prior non-capital felony conviction contained in the enhancement portion of the indictment and proof of the convictions, the court's charge required the jury to assess the punishment unless the jury returned a verdict of "True" to appellant's special pleas. The jury answered "True" and the court assessed punishment at life as required by Article 63, Vernon's Ann.P.C., which was then in force.

Appellant's two prior non-capital felony convictions being properly alleged and proved, the punishment was fixed by Art. 63, V.A.P.C., at life imprisonment. Once the jury returned its verdict of "True," the court properly assessed the punishment; there was no necessity for the jury to assess the punishment because it was automatically fixed by law. See Williams v. State, 463 S.W.2d 15 (Tex.Cr.App. 1971).

MINUTES, 187th JUDICIAL DISTRICT COURT, BEXAR COUNTY, TEXAS VOL: 7
AT MARCH TERM, A. D. 19 73 PAGE: 373

SENTENCE

THE STATE OF TEXAS NO. 73-CR-214

VS. OFFENSE: THEFT OVER FIFTY DOLLARS
WILLIAM J. RUMMEL BY FALSE PRETEXT (HABITUAL)

On this the 26th day of APRIL A. D. 19 73, this cause being again called; the State appeared by the District Attorney and the defendant appeared in person and by counsel WILLIAM B. CHENAULT, III HAROLD WARFORD, for the purpose of having sentence of the law pronounced in accordance with the verdict and judgement rendered and entered against him on APRIL 20, 1973 NO MOTION FOR NEW TRIAL HAVING BEEN FILED ON THIS DATE APRIL 26, 1973

And thereupon the said defendant was asked by the Court whether he had anything to say why sentence should not be pronounced against him, and he answered nothing in bar thereof. Whereupon the Court proceeded, in the presence of said defendant to pronounce sentence against him as follows, to-wit: "It is the order of the Court that the defendant WILLIAM J. RUMMEL, who has been adjudged to be guilty of THEFT OVER FIFTY DOLLARS BY FALSE PRETEXT (HABITUAL) a felony, and whose punishment has been assessed at confinement in the Texas Department of Corrections for "LIFE" years, be delivered by the Sheriff of Bexar County, Texas immediately to the Director of Corrections of the State of Texas, or other person legally authorized to receive such convict, and said defendant shall be confined in said Department of Corrections for "LIFE", in accordance with the provisions of the law governing the Texas Department of Corrections."

It is further ordered that said sentence do begin and operate from: _____

Whereupon the Court advised the defendant fully as to his right of appeal, and notice of of appeal having been given, the said defendant is remanded to jail until said Sheriff can obey the directions of this sentence.

THEREUPON, IN OPEN COURT, BY AND THROUGH HIS COUNSEL, DEFENDANT GAVE NOTICE OF APPEAL TO OUR COURT OF CRIMINAL APPEALS AT AUSTIN, TEXAS AND THEREFORE, SAID DEFENDANT IS HEREBY GRANTED NINETY (90) DAYS IN WHICH TO PERFECT SAID APPEAL AND THE EXECUTION OF THE SENTENCE HEREIN IMPOSED IS STAYED PENDING RECEIPT OF THE MANDATE OF THE COURT OF CRIMINAL APPEALS AT AUSTIN, TEXAS AND DEFENDANT IS REMANDED TO JAIL.

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JUDGE PRESIDING

MINUTES, 187th JUDICIAL DISTRICT COURT, BEXAR COUNTY, TEXAS VOL.: 7
AT MARCH TERM, A. D. 19 73 PAGE.: 393

VERDICT & JUDGMENT - PLEA OF NOT GUILTY BEFORE JURY WITH PUNISHMENT ASSESSED BY JURY
THE STATE OF TEXAS NO.: 73-CR-211

VS. OFFENSE: THEFT OVER FIFTY DOLLARS

WILLIAM J. RUMMEL BY FALSE PRETEXT (HABITUAL)

On this 9th day of APRIL, A. D. 1973, the above entitled and numbered cause being called for trial, appeared the parties, the State of Texas by her district attorney, and defendant, WILLIAM J. RUMMEL in person and by counsel, WILLIAM CHEANAULT, III and both parties having announced ready for trial; said defendant having heretofore been duly arraigned and entered a plea of Not Guilty.

Thereupon a jury composed of KENNETH R. CLARK and eleven others was selected, impanelled and sworn, and after hearing the indictment read, the defendant's plea of not guilty thereto and the evidence submitted, and having been charged by the Court as to their duty to determine the guilt or innocence of the defendant, and heard the arguments of counsel thereon, they retired in charge of the proper officer and returned into open court, in due form of law, on the 10th day of APRIL A. D. 1973, the following verdict which was received by the Court and is now entered upon the minutes:
WE, THE JURY, FIND THE DEFENDANT WILLIAM J. RUMMEL GUILTY OF THE OFFENSE OF THEFT OF CORPOREAL PERSONAL PROPERTY OVER THE VALUE OF $50.00 AS ALLEGED IN THE INDICTMENT.

/s/ KENNETH R. CLARK
Foreman

Thereupon, the defendant requested that the same jury assess the punishment, and in accordance with law, after further evidence was heard and after having been again charged by the Court, the jury retired in charge of the proper officer and returned into open court, in due form of law, on the 10th day of APRIL, A. D. 1973, the following verdict which was received by the Court and is now entered upon the minutes: We the Jury, having found the defendant, William J. Rummel, guilty of the offense of Theft Over Fifty Dollars by False Pretext as alleged in the 1st paragraph of the indictment, further find that he is one and the same person who was [illegible] and finally convicted in Cause #60-977 of the offense of Passing As Genuine Forged Instrument, and further find that he was [illegible] before convicted on the 10th day of December, A. D. 19[illegible], in Cause No. [illegible] of the offense of Presentation Of Credit Card With Intent To Defraud Another Service of the Value of Fifty Dollars ($50.00) or more, as alleged in the 3rd paragraph of the indictment and find that the allegations in the 2nd and 3rd paragraphs of the indictment are "TRUE"

/s/ KENNETH R. CLARK
Foreman

It is therefore CONSIDERED, ORDERED AND ADJUDGED by the Court that the defendant is guilty of the offense of THEFT OVER FIFTY DOLLARS BY FALSE PRETEXT (HABITUAL), and that he be punished, as has been determined by the ~~jury~~ COURT, at confinement in the Texas Department of Corrections for a term of "LIFE" years.

It is further ORDERED by the Court, that the State of Texas do have and recover from said defendant all costs of prosecution for which execution may issue, and the defendant be (remanded to jail) (~~continued on bond~~) to await the further order of this court.

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APPENDIX B

The Eighth Amendment to the United States Constitution provides as follows:

> Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishments inflicted.

Article 12.42(d) of the Texas Penal Code of 1974 provides as follows:

> If it be shown on the trial of any felony offense that the defendant has previously been finally convicted of two felony offenses, and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having been final, on conviction he shall be punished by confinement in the Texas Department of Corrections for life.

Article 63 of the Texas Penal Code of 1925 provides as follows:

> Whoever shall have been three times convicted of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary.

Article 979 of the Texas Penal Code of 1925 provides, in pertinent part:

> He is guilty of forgery who without lawful authority, and with intent to injure or defraud, shall make a false instrument in writing purporting to be the act of another, in such manner that the false instrument so made would (if the same were true) have created, increased, diminished, discharged or defeated any pecuniary obligation, or would have transferred, or in any manner have affected any property whatsoever.

Article 996 of the Texas Penal Code of 1925 provides, in pertinent part:

> If any person shall knowingly pass as true, or attempt to pass as true, any such forged instrument in writing as is mentioned and defined in the preceding articles of this chapter, he shall be confined in the penitentiary not less than two nor more than five years.

Article 1410 of the Texas Penal Code of 1925 provides as follows:

> "Theft" is the fraudulent taking of corporeal personal property belonging to another from his possession, or from the possession of some person holding the same for him, without his consent, with intent to deprive the owner of the value of the same, and to appropriate it to the use or benefit of the person taking.

Article 1413 of the Texas Penal Code of 1925 provides, in pertinent part:

> The taking must be wrongful, . . . but if the taking, though originally lawful, was obtained by any false pretext, or with any intent to deprive the owner of the value thereof, and appropriate the property to the use and benefit of the person taking, and the same is so appropriated, the offense of theft is complete.

Article 1555b of the Texas Penal Code of 1925 provides, in pertinent part:

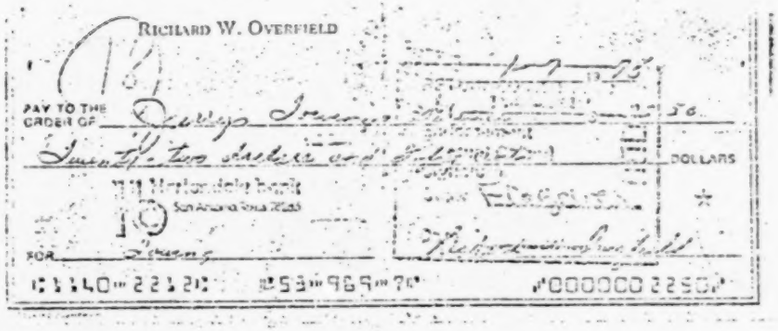
> Section 1. It shall be unlawful for any person to present a credit card or alleged credit card, with the intent to defraud, to obtain or attempt to obtain any item of value or service of any type; or to present such credit card or alleged credit card, with the intent to defraud, to pay for items of value or services rendered.

TRUE BILL OF INDICTMENT

IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS, the Grand Jury of Bexar County, State of Texas, duly organized, empaneled and sworn as such at the MARCH term, A. D., 1978, of the 175TH Judicial District Court of said County, in said Court, at said term, do present in and to said Court that in the County and State aforesaid, and anterior to the presentment of this indictment, and on or about the

> 7TH day of JANUARY, A.D., 1978, LIONEL ALBERT GUTIERREZ hereinafter called defendant did then and there knowingly and intentionally with intent to defraud and harm another, PASS TO JOHNNIE SANCHEZ a WRITING, NAMELY: A CHECK that had been MADE, EXECUTED AND COMPLETED so that it purported to be the act of another who did not authorize the act, and the said defendant knew said CHECK was forged and which said CHECK is to the tenor following:

> LETTERS AND NUMERALS 'RETURNED NOT PAID by 1140-2212 ENDORSEMENT__ ACCOUNT CLOSED__ SIGNATURE__ OTHER forgeries DATE__' THE ENCIRCLED '18' 'NOT' AND THE ILLEGIBLE MARKS, ACROSS THE FACE OF SAID INSTRUMENT AND '0000002250' AT THE LOWER RIGHT HAND CORNER OF SAID INSTRUMENT WERE ADDED AFTER IT WAS PASSED TO JOHNIE SANCHEZ.



[illegible] FIRST GUERRERO, [illegible] on the [illegible] day of [illegible], A.D., 1978, in the [illegible] District Court of [illegible] County, State of Texas - San Antonio Division, in Cause No. [illegible], on the docket of said Court, the said LIONEL ALBERT GUERRERO, hereinafter referred to as defendant, was duly and legally convicted in said last named Court of a felony, to-wit: FORGING, WITH INTENT TO DEFRAUD AND INJURE PERSONS, UTTERING AND PUBLISHING AS TRUE, A FALSE, FORGED AND COUNTERFEIT CHECK NUMBER 10,755,656, DATED SEPTEMBER 1969, IN THE AMOUNT OF $100.00, KNOWING THE SAME TO BE FORGED AND COUNTERFEIT AND WITH INTENT TO DEFRAUD AND INJURE THE PERSON WHOSE NAME WAS FORGED THEREON, upon an indictment then legally pending in said last named Court and of which said Court had jurisdiction; and said conviction was a final conviction and was a conviction for an offense committed by the defendant, prior to the commission of the offense hereinbefore charged against him, as set forth in the FIRST paragraph hereof.

And the Grand Jurors aforesaid do further present that prior to the commission of each of the aforesaid offenses by the defendant, to-wit: on the 21ST day of JANUARY, A.D., 1964, in the 150TH District Court of BEXAR COUNTY, TEXAS, in Cause No. B-3617-S, on the docket of said Court, the said LIONEL ALBERT GUERRERO, the aforesaid defendant, was duly and legally convicted in said last named Court of a felony, to-wit: CHILD DESERTION - SECOND OFFENSE, upon an indictment then legally pending in said last named Court and of which said Court had jurisdiction; and said conviction was a final conviction and was a conviction for an offense committed by the defendant prior to the commission and conviction of the offense hereinbefore charged against him in the SECOND paragraph hereof, and said conviction set forth in this paragraph was prior to the commission of the offense set forth in the FIRST paragraph hereof; against the peace and dignity of the State.

Foreman of the Grand Jury

THE FOLLOWING FOR DISTRICT CLERK'S USE ONLY

OFFENSE: FORGERY
NAME: LIONEL ALBERT GUERRERO
ADDRESS: 311 N. SALADO
GRAND JURY NO. 129656

FILE NO. 78-CR-0538 HABITUAL 1965

WITNESS: STATE'S ATTORNEY

cb

THE ORIGINAL OF THIS
PAGE FILED WITH THE COURT
WAS ALMOST TOTALLY ILLEGIBLE.

MAR 22 1978

STATE OF TEXAS
COUNTY OF BEXAR
I, TOM DICKHOFF, DISTRICT CLERK OF BEXAR COUNTY, Texas, do hereby certify that the foregoing is a true and correct copy of the original record, now in my lawful custody and conveyance, as appears of record filed 3-22-78 in my office.
Witness my official hand and seal of office, this 1-16-79
TOM DICKHOFF, DISTRICT CLERK
Bexar County, Texas
By Cecilia Hernandez

MINUTES, 144TH JUDICIAL DISTRICT COURT, BEXAR COUNTY, TEXAS VOL.: ____
AT NOVEMBER TER., A.D. 1978 PAGE: ____

VERDICT AND JUDGMENT=PLEA OF NOT GUILTY BEFORE JURY WITH PUNISHMENT ASSESSED BY JURY=HABITUAL FELONY OFFENDER

THE STATE OF TEXAS NO.: 78-CR-538 IN THE DISTRICT COURT, 144TH JUDICIAL DISTRICT, BEXAR COUNTY, TEXAS

VS. OFFENSE: FORGERY

LIONEL ALBERT GUERRERO (HABITUAL FELONY OFFENDER)

On this 1st day of NOVEMBER, the above styled and numbered cause being called for trial, appeared the parties, The State of Texas by her District Attorney, and defendant, LIONEL ALBERT GUERRERO, in person and by counsel, CRAIG SPENCE, and both parties announced ready for trial, said defendant having heretofore been duly arraigned and entered a plea of Not Guilty.

Thereupon a jury composed of WILLIE ALLEN JAMES and eleven others was selected, impanelled and sworn, and after hearing the first paragraph of the indictment read, the defendant's plea of not guilty thereto and the evidence submitted, and having been charged by the Court as to their duty to determine the guilt or innocence of the defendant, and heard the arguments of counsel thereon, they retired in charge of the proper officer and returned into open court, in due form of law, on the 1st day of NOVEMBER, the following verdict which was received by the Court and is now entered upon the Minutes:

"We, the Jury, find the defendant, Lionel Albert Guerrero, guilty of the offense of forgery."

/s/ WILLIE ALLEN JAMES
FOREMAN

Thereupon, the defendant having timely requested that the same jury assess the punishment, and in accordance with law, The State of Texas read the second and third paragraphs of the indictment, to which the defendant LIONEL ALBERT GUERRERO, pleaded "Not True", and after further evidence was heard, having been again charged by the Court and heard the arguments of counsel thereon the jury retired in charge of the proper officer and returned into open court, in due form of law, on the 2nd day of NOVEMBER the following verdict which was received by the Court and is now entered upon the Minutes:

"We, the Jury, having found the defendant, Lionel Albert Guerrero, guilty of the offense of forgery, as charged in the first paragraph of the indictment, do further find that he is one and the same person who was duly, legally and finally convicted in Cause Number SA70CA123 of the offense of having, with intent to defraud the United States, uttered and published as true,

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SENTENCE

THE STATE OF TEXAS NO. 78-CR-538

VS. OFFENSE: FORGERY (HABITUAL)

LIONEL ALBERT GUERRERO

On the 6TH day of DECEMBER A. D. 1978, this cause being again called; the State appeared by the District Attorney and the defendant appeared in person and by counsel JOE STENBERG, for the purpose of having sentence of the law pronounced in accordance with the verdict and judgement rendered and entered against him on NOV. 1,1978; Defendant's amended motion for a new trial having been filed on November 17, 1978, and having been denied and overruled on this date herein;

And thereupon the said defendant was asked by the Court whether he had anything to say why sentence should not be pronounced against him, and he answered nothing in bar thereof. Whereupon the Court proceeded, in the presence of said defendant to pronounce sentence against him as follows, to-wit: "It is the order of the Court that the defendant LIONEL ALBERT GUERRERO, who has been adjudged to be guilty of FORGERY (HABITUAL) a felony, and whose punishment has been assessed at confinement in the Texas Department of Corrections for "LIFE" years, be delivered by the Sheriff of Bexar County, Texas immediately to the Director of Corrections of the State of Texas, or other person legally authorized to receive such convict, and said defendant shall be confined in said Department of Corrections for not less than "LIFE" ~~years~~ nor more than "LIFE" years, in accordance with the provisions of the law governing the Texas Department of Corrections."

It is further ordered that said sentence do begin and operate from: JANUARY 14, 1978 and thereupon, said defendant, in open court by and through his counsel, gave Notice of Appeal to the Court of Criminal Appeals at Austin, Texas; therefo execution of the sentence imposed herein is hereby ORDERED stayed pending receipt of the Mandate of our Court of Criminal Appeals at Austin, Texas, said defendant is hereby granted ninety days from this date in which to perfect said appeal and the said defendant is remanded to jail until said Sheriff can obey the directions of this sentence.

SIGNED and ENTERED, THIS 13th DAY OF December, 1978.

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Peter Michael Curry
PETER MICHAEL CURRY JUDGE PRESIDING
FOR THE 144TH DISTRICT COURT

STATE OF TEXAS
COUNTY OF BEXAR
I, TOM BICKHOFF, DISTRICT CLERK OF BEXAR COUNTY, Texas, do hereby certify that the foregoing is a true and correct copy of the original record, now in my lawful custody and possession, as appears of record ——— in my office.
Witness my official hand and seal of office, this
1-16-79
TOM BICKHOFF, DISTRICT CLERK
Bexar County, Texas
By Aurora Hyanda

1/16/78 motion for New Trial was overruled on December 6, 1978. Prin Amended Comp.

78-CR-0538

FILED
NOV 17 1978
Mary W. Lyons

THE STATE OF TEXAS

VS.

LIONEL ALBERT GUERRERO

IN THE DISTRICT COURT
166th JUDICIAL DISTRICT
BEXAR COUNTY, TEXAS

AMENDED
MOTION FOR NEW TRIAL

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES, LIONEL ALBERT GUERRERO, the Defendant in the above numbered and entitled cause, and moves the Court to set aside the verdict and judgment herein rendered against him on November 2nd, 1978, and grant him a new trial because of the following reasons, to-wit:

I

That the habitual criminal statute, specifically, Section 12.42 of the Texas Penal Code, which requires the trial court to sentence a defendant to life imprisonment upon a third conviction for any felony, is, as applied to the defendant, violative of the Eight Amendment to the United States Constitution.

II

That the second count of the indictment alleges that in 1970, the Defendant was convicted of a felony, to-wit: HAVING, WITH INTENT TO DEFRAUD THE UNITED STATES, UTTERED AND PUBLISHED AS TRUE, UNITED STATES TREASURY CHECK NUMBER 18,758,046, DATED SEPTEMBER 1969, IN THE AMOUNT OF $123.10, BEARING THE PURPORTED ENDORSEMENT OF THE PAYEE, WHICH ENDORSEMENT WAS FORGED, AS THE DEFENDANT THEN AND THERE WELL KNEW. Further, the third count alleges that in 1964, the Defendant was convicted of a felony, to-wit: CHILD DESERTION - SECOND OFFENSE.

III

That the case of Rummel v Estelle, rendered by the 5th Circuit Court of Appeals on March 6, 1978, holds that "In addition to limiting the kinds of punishment that a state may impose and placing substantive limits on what a state may declare criminal and punish as such, the Cruel and Unusual Punishment Clause prescribes amounts of punishment which are grossly disproportiante to the severity of the crime."

IV

That the Defendant would point out to this Honorable Court that the third count of the indictment alleging child desertion-second offense would under present Texas Law constitute a felony of the third degree with the punishment for any term of not more than 10 years or less than 2 years in the Depatment of Corrections.

V

Further, that the second count alleges the offense of having, with intent to defraud the United States, uttered and published as true, United States treasury check number 18,758,046, dated Sept., 1969, in the amount of $123.10, bearing the purported endorsement of the payee, which endorsement was forged, as the defendant then and there well knew which under present Texas Law constitutes a third degree felony with a punishment range from 2 to ten years.

VI

Apart from its habitual criminal statute, Texas imposes a mandatory life sentence (or death) only for the crime of capital murder: murdering a policeman, fireman, or prison employee, murdering for pay or while escapting from prison, or while committing kidnapping, burglary, robbery, aggravated rape or arson. A trial court could impose a sentence for as little as five years if the defendant had committed a single first degree felony, such as murder, aggravated rape, or arson. The same five year minimum would apply if the defendant had committed a second degree felony with a prior conviction for another: for example, aggravated kidnapping with a prior conviction for rape or voluntary manslaughter with a prior conviction for burglary. with a single conviction for a third degree felony, the trial court could impose a term no longer than 10 years and as short as 2 years.

VII

Compared with the above statutory punishment for violent felonies, for which Texas does not bind the trial court's hand in granting leniency, the punishment of life indiscriminately imposed upon the defendant is too harsh.

VIII

As in Rummel, the intervening action by the Texas legislature, underscores the relatively trivial nature of the defendant's first offense, because Texas law treats such an offense as a misdemeanor. (See page 2587).

IX

Further, the Defendant's second offense constitutes a third degree felony under Texas law, and under state law the maximum proscribed such conduct would be 5 years.

X

The Defendant would further point out to the court that the Defendant's first offense occurred some 15 years ago and that intervening action by the legislature underscores the relative insignificants of that offense which would be punished by a maximum of one year in the county jail.

XI

The Defendant would therefore, submit to the court that in view of the drmatically lower minimum penalites that Texas imposes upon defendants who commit even the most violent crimes short of capital murder and even upon defendants with a second conviction and a prior offense involving violent second degree felonies, a significantly less penalty would fulfill the legislative objectives of protecting citizens and deterring crime.

XII

That the legislative prerogative to fix sentences is not unbounded under Rummel, (See page 2588) and that in this case the application of nondiscretionary judicial action would be a violation of the Eighth Amendment.

XIII

Defendant further contends that the court committed material error calculated to injure the rights of the defendant by allowing the state to introduce evidence of extraneous nature such as the evidence that was used to indict defendant on three previous indictments and said indictment were pending and untryed said evidence being the alleged forged checks which are alleged to have been passed by defendant. Where the state did not offer any clear and conclusive evidence that it was this defendant who attempted the previous forgeries which were allowed to go before the jury. Where the physical elements of the charged offense were not matched by the physical elements of the conduct alleged to comprise extrinsic the offenses that were offered to show defendants intent to pass the check to"Johnnie Sanchez"

XIIII

Further the court misdirected the jury as to the law constituting a material error which is reasonably calculated to injure, and did injure, the rights of the defendant. The Charge of the Court id fundamentally defective in the following particulars:

(1) The Charge allowed the jury to find the defendant "guilty" if the jury found, inter alia, that the defendant had intent to utter a check to "another,"while the indictment alleged that the defendant had intent to pass said check to"Johnnie Sanchez"(emphasis added), thereby permitting the jury to find the defendant "guilty" even if the defendant lacked the intent to pass the check to Johnnie Sanchez;

(2) The Court's Charge allowed the jury to find the defendant "guilty" of the offense of forgery if the jury found that the defendant knew that the check was altered, made, completed, executed or authenticated,while the indictment alleged only that the defendant knew the check had been "MADE, EXECUTED, AND COMPLETED," thereby allowing the jury to convict the defendant if they found

that he knew that the check was altered or authenticated, grounds for conviction not alleged in the indictment;

(3) The Court's Charge, in Paragraph___ where the law was applied to the facts of the particular case, did not require the jury to find that the check alleged in the indictment was actually forged before finding the defendant "guilty" of the offense of forgery; The Court's Charge did not, therefore, apply the law to the facts insofar as it failed to instruct the jury that it must find the instrument possessed by the defendant was actually forged before finding the defendant "guilty";

(4) The Court's Charge was fundamentally defective in that, although the indictment alleged the check was forged, the Charge allowed the jury to convict the defendant for forgery without requiring that the jury first find that the check involved was actually forged, as alleged in the indictment, thus permitting the jury to convict the defendant on a ground not alleged in the indictment.

XV

The Court comitted material error calculated to jure in the rights of the defendant by allowing defendant to be prosecuted on deffective indictment on the grounds that the Grand Jury alleged that the check had been "MADE, EXECUTED AND COMPLETED so that it purported to be the act of another who did not authorize that act" without specifying the identity of that other person who did not authorize the act.

XVI

The verdict of the jury is contrary to law and evidence in the following particulars:

(1) There is no evidence that the check alleged in the indictment was forged;

(2) There is not evidence that the check received into evidence was forged;

(3) There is insufficient evidence that the check alleged in the indictment was forged;

(4) There is insufficient evidence that the check admitted into evidence at trial was forged;

(5) There is no evidence that the defendant knew the check admitted into evidence at trial was forged, if it was;

(6) There is insufficient evidence to sustain the finding that the defendant knew the check admitted into evidence was forged, if it was;

(7) There is no evidence to support the finding of the jury that the defendant had intent to defraud and harm another;

(8) There is insufficient evidence to support the finding of the jury that the defendant intended to defraud and harm another.

WHEREFORE, PREMISES CONSIDERED, the Defendant respectfully moves this Court to grant to him a new trial in this cause.

Respectfully Submitted,

LIONEL ALBERT GUERRERO-Defend.
218 So. Laredo St.
San Antonio, Texas 78207

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Motion For New Trial was served upon the State's attorney, Mr. _____, by hand delivering to same on the____day of _____,1978.

LIONEL ALBERT GUERRERO
Defendant Pro-Se

STATE OF TEXAS
COUNTY OF BEXAR
I, [illegible], DISTRICT CLERK OF BEXAR COUNTY, [illegible] that the foregoing is a [illegible] copy of the original record now [illegible] as appears of [illegible] 11-17-78 in my office.
Witness my official hand and seal of office this
1-16-79
[illegible] DISTRICT CLERK
[illegible] County, Texas
By Laura Navarro Deputy

VERDICT AND JUDGMENT=PLEA OF NOT GUILTY BEFORE JURY WITH PUNISHMENT ASSESSED BY JURY=HABITUAL FELONY OFFENDER=CONTINUED:

NO.: 78-CR-538 THE STATE OF TEXAS VS. LIONEL ALBERT GUERRERO

United States Treasury check number 18,758,046 dated September 1969, in the amount of $123.10, bearing the purported endorsement of the payee, which endorsement was forged, as the defendant then and there well knew, as alleged in the second paragraph of the indictment and further find that he is one and the same person who was duly, legally and finally convicted in Cause Number D-3617-S of the offense of Child Desertion - Second Offense as alleged in the third paragraph of the indictment and find that all the allegations in the second and third paragraphs of the indictment are "True."

It is therefore CONSIDERED, ORDERED and ADJUDGED by the Court that the defendant, LIONEL ALBERT GUERRERO, is guilty of the felony offense of FORGERY that said defendant committed said offense on JANUARY 7, 1978, and that he be punished, as has been determined by the Jury, at confinement in the Texas Department of Corrections for a term of LIFE.

It is further ORDERED by the Court that the State of Texas do have and recover from said defendant all costs of prosecution for which execution may issue, and the defendant be remanded to jail to await the further order of this Court. DEFENDANT GIVEN TEN (10) DAYS MOTION FOR A NEW TRIAL.

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Peter Michael Curry

PETER MICHAEL CURRY JUDGE PRESIDING
FOR THE 144TH DISTRICT COURT

STATE OF TEXAS
COUNTY OF BEXAR
I, TOM RICKHOFF, DISTRICT CLERK OF BEXAR COUNTY, Texas, do hereby certify that the foregoing is a true and correct copy of the criminal record, now in my lawful custody and possession, as appears of record ~~above~~ ..... in my office.

Witness my official hand and seal of office, this
1-16-79

TOM RICKHOFF, DISTRICT CLERK
Bexar County, Texas
By Aurora Alexander